



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 25, 2003

Mr. Sim W. Goodall
Police Legal Advisor
City of Arlington
P.O. Box 1065
Arlington, Texas 76004-1065

OR2003-6757

Dear Mr. Goodall:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 188276.

The Arlington Police Department (the "department") received a request for calls for service during a particular time period for certain locations, analyses of these calls, budget documents, documentation indicating areas of the City of Arlington that the department deems "problematic," and annual reports prepared by the department in the last five years. You state that some budget information and the requested annual reports will be released and that other requested information does not exist. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that does not exist at time request is received). We understand you to assert that other requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that Exhibit C consists entirely of completed reports made of, for, or by the department, which are subject to section 552.022 of the Government Code. This section provides that "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," is public and may not be withheld unless it is expressly confidential under other law or excepted from disclosure by section 552.108. Gov't Code § 552.022(a)(1). You do not claim that the submitted information is excepted under section 552.108. Instead, you assert that it may be withheld pursuant to section 552.103. This section is a discretionary exception and does not constitute "other law" for purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103);

Open Records Decision Nos. 663 (1999) (governmental body may waive section 552.103), 522 at 4 (1989) (discretionary exceptions in general). Thus, Exhibit C may not be withheld pursuant to section 552.103. However, you also assert that these reports are excepted from disclosure under section 552.101, and we will consider those arguments.

You assert that Exhibit C must be withheld under section 552.101 on the basis of common law privacy concerns because officers' "safety could be jeopardized by the release of this information."¹ In Open Records Decision No. 169 (1977), we considered the personal safety concerns of public employees, and we recognized that there may be specific instances where "special circumstances" exist to except from public disclosure some of the employees' addresses. *See also* Open Records Decision No. 123 (1976). In Open Records Decision No. 169, the employees demonstrated that their lives would be placed in danger if their addresses were released to the public. ORD 169 at 7. This office further noted that the initial determination of credible threats and safety concerns should be made by the governmental body to which a request for disclosure is directed, and this office will determine whether a governmental body has demonstrated the existence of special circumstances on a case-by-case basis. *Id.* Having considered your arguments and the submitted information, we conclude that Exhibit C must be withheld pursuant to section 552.101 and the common law doctrine of special circumstances only to the extent that it identifies undercover police officers. To the extent Exhibit C does not identify any particular undercover officer, it may not be withheld under section 552.101 on the basis of common law special circumstances and must be released.

We turn now to your claims regarding Exhibit B, which is not subject to section 552.022. Because your claim regarding section 552.103 is broader, we address it first. This section provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

¹Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses common law privacy.

A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the hospital received the request, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

In this case, you inform us that at the time the department received this request, the City of Arlington was involved in both federal and state court lawsuits involving adult-oriented businesses. In support of your position, you have provided us with what you refer to as “[c]opies of all pleadings related to this litigation.” The information submitted as Exhibit D reveals that the Chief of Police is also a named party to the federal suit. We therefore find that you have met the first prong of the section 552.103 test.

The second prong of the section 552.103 test requires a showing that the information at issue is related to this litigation. Although you state that “[t]he Arlington Police Department and the City of Arlington believe that all of the information included in Exhibits B and C should be withheld from release pursuant to the litigation exception,” you have provided no explanation as to how the information concerning calls for service relates to the pending lawsuits. Having reviewed the submitted pleadings, we are able to ascertain that the pending federal lawsuit concerns claims that certain city ordinances are unconstitutional. You have not explained, nor is it otherwise apparent, how the calls for service at particular locations have any bearing on the constitutionality of the city ordinances or in any way relate to the pending federal litigation. Furthermore, despite your representation to the contrary, you have not submitted the pleadings for the state court lawsuit, nor have you explained the subject matter of that litigation. We thus conclude that you have failed to provide a showing that the information at issue is related to either pending litigation. Accordingly, no part of Exhibit B may be withheld pursuant to section 552.103.

You also contend that “[s]ome of the information included in Exhibit B is excluded by various laws from release. Several calls identify alarm systems, juvenile offenses, sexual assault offenses (identifying victims’ residences), etc.” Section 552.101 also excepts from disclosure information protected by other statutes. Section 58.007 of the Family Code governs juvenile law enforcement records and provides in part:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

(1) if maintained on paper or microfilm, kept separate from adult files and records;

(2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

Section 58.007(c) applies to records of juvenile conduct that occurred on or after September 1, 1997. In this case, the documents at issue do not identify any particular juvenile individual engaged in delinquent conduct or conduct indicating a need for supervision. *See* Fam. Code § 51.03 (defining “delinquent conduct” and “conduct indicating a need for supervision”). Therefore, we have no basis to determine that any portion of Exhibit B is made confidential under section 58.007 of the Family Code. Accordingly, the department may not withhold any of this information under section 552.101 on the basis of section 58.007.

Section 552.101 also encompasses information protected by section 261.201(a) of the Family Code. This provision provides:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

In this case, the documents at issue are not files, reports, records, communications, or working papers used or developed in an investigation under chapter 261 or in providing services as a result of an investigation. Moreover, the submitted information does not identify any of the alleged victims in these matters or reveal on its face whether any of them was a child for purposes of section 261.201 at the time of the alleged offenses. *See* Fam. Code § 101.003(a) (defining “child” as “person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes”). Therefore, we determine that the department may not withhold any portion of Exhibit B under section 552.101 in conjunction with section 261.201 of the Family Code.

Section 552.101 also encompasses section 1702.284 of the Occupations Code, which provides:

Information contained in alarm systems records maintained by a governmental body that concerns the location of an alarm system, the name of the occupant of an alarm system location, or the type of alarm system used is confidential and may be disclosed only to the commission or as otherwise required by state law or court order.

Occ. Code § 1702.284. To the extent Exhibit B includes information that concerns the location of an alarm system or the type of alarm system used, it is confidential under section 1702.284 and must be withheld pursuant to section 552.101.

Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. We note that the common-law right of privacy protects the privacy of individual persons. See Open Records Decision No. 432 (1985). On review we find that the information in Exhibit B does not refer to any individual person by name and does not contain other information that in any way identifies any particular person. Thus, we determine that the department may not withhold any portion of this information under section 552.101 in conjunction with the common law right to privacy.

In summary, to the extent that Exhibit C identifies undercover police officers, it must be withheld pursuant to section 552.101 and the common law doctrine of special circumstances. To the extent Exhibit B includes information that concerns the location of an alarm system or the type of alarm system used, such information must also be withheld pursuant to section 552.101 in conjunction with section 1702.284. The remaining submitted information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

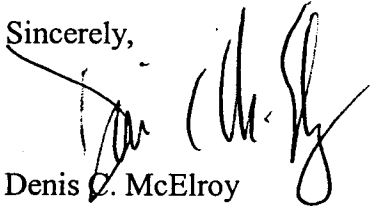
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 188276

Enc. Submitted documents

c: Mr. R. Bruce McLaughlin
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(w/o enclosures)